IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 11TH SEPTEMBER 2007 / 20TH BHADRA 1929

RSA.No. 766 of 2007()

AS.41/2002 of SUB COURT,NEYYATTINKARA
OS.187/1998 of PRL.M.C.,NEYYATTINKARA

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APPELLANTS/APPELLANTS/DEFENDANTS :

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1. CHELLAPPAN NADAR ALIAS GOPALAN, AGED 55 YEARS, RESIDING AT OTTAPLAVILA VEEDU, VENPAKAL DESOM,ATHIYANNOOR,PAKUTHY.

2. CHELLAPPAN NADAR KUNJAN ALIAS SREEDHARAN AGED 53 YEARS, RESIDING AT POTTAVILA VEEDU, VENPAKAL DESOM,ATHIYANNOOR,PAKUTHY.

3. CHELLAPPAN NADAR SUREDNRAN, AGED 43 YEARS OF -DO-.

4. JAYAGOPAL, AGED 62 YEARS, RESIDING AT POTTAYIL VEEDU,VENPAKAL DESOM,ATHIYANNOOR PAKUTHY.

BY ADV. SRI.T.RAJASEKHARAN NAIR

RESPONDENTS: RESPONDENTS/PLAINTIFFS

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1. SAROJINI BABY SAROJAM, W/O.THOMAS MORISON, AGED 54 YEARS, NADABHAVAN, KAMUKINKODU,VENPAKAL DESOM,ATHIYANNOOR PAKUTHY AND ASLO HAVING AT VELIYAVILA VEEDU,VENGANOOR DESOM, AND PARUTHIVILA VEEDU,VAZHUTHOOR DESOM, NEYYATTINKARA.

2. THOMASON MORISON, AGED 61 YEARS, RESIDING AT -DO-.

BY ADV. SRI.G.S.REGHUNATH

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 11/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO.1274/2007 IN R.S.A.NO.766/2007

11.9.07 Dismissed Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 766 OF 2007

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Dated this the 11th day of September, 2007

JUDGMENT

Defendants in O.S.187/1998 on the file of Munsiff Court, Neyyattinkara are the appellants. Plaintiffs are the respondents. Respondents instituted the suit seeking a decree for declaration of title, recovery of possession and damages. The case of respondents was that plaint schedule property belongs to respondents absolutely and there are four items of properties and there is a well, bath room, latrine and cow shed in the plaint schedule property and on the northern side of plaint B schedule property there is a road and separating the road and the property a mud embankment having a height of four feet is there and on the western side of the plaint schedule property a barbed wire fence was put up and on the southern side of plaint schedule property there is a compound wall having six feet height and on the

eastern side of the plaint schedule property there was a pathway having a width of one and half feet and while constructing the compound wall on the eastern side a strip of land having a width of one and a half feet was spared for the pathway and the adjacent property owner on the eastern side of pathway had also surrendered some extent of property for the pathway and the appellants have no manner of right over any portion of plaint schedule property and they attempted to widen the pathway taking a portion of the plaint schedule property and they have no right to do so and therefore they are to be restrained by a permanent prohibitory injunction. Subsequently plaint was got amended contending that on 20.12.1998 after the filing of the suit, appellants trespassed into the plaint schedule property and with the aid of the workers demolished the compound wall and gate on the eastern compound wall and cut a tamarind tree, jack tree, some coconut trees and thereby sustained a loss of Rs.58,000/- and they are entitled to a

decree for realisation of the said amount as damages. They also sought a decree for declaration of title to the plaint C schedule property, which is the encroached portion of the property and recovery of possession of the same.

2. Appellants in the written statement contended that the width of the eastern pathway is not correctly stated in the plaint and no extent of the property was spared by respondents for forming the pathway and on the other hand respondents attempted to construct a compound wall enclosing a portion of the pathway to their property and they did not obtain permission for construction of the compound wall and appellants never attempted to trespass into the property and therefore respondents are not entitled to the decree sought for. It was contended that on the eastern side of plaint B schedule property a road is situated. In the additional written statement it was contended that on 20.12.1998, they did not trespass into the plaint schedule property as alleged and they did

not demolish any compound wall and did not cause a loss of Rs.58,000/-. It was contended that the road passing through the eastern boundary of plaint schedule property starts from Kamukinode and passes through Ottaplavila-Pottavila Kusevoorkonam. The said road is having a length of 3 k.m and it was constructed by Athiyannoor grama panchayat and several persons residing in Athiyannoor grama panchayat whose names were given in the written statement are necessary parties to the suit. So also P.W.D. Department is also a necessary party to the suit. A criminal case is pending with regard to the widening of panchayat road and no property is in existence as C schedule and respondents are not entitled to the decree for recovery of possession or damages.

3. Learned Munsiff on the evidence of PW1 and Dws.1 to 3 found that after the institution of the suit, plaint C schedule property which is part of the plaint schedule property was trespassed upon and added to the existing way and it was done by

demolishing the compound wall and cutting the trees and as plaint C schedule property is part of the property of respondents, they are entitled to a declaration of title and recovery of possession. Learned Munsiff also found that evidence establish that compound wall was demolished and trees were cut and thereby as assessed by the Commissioner in Ext.C1 report, a total damages of Rs.55,276/- was caused. Learned Munsiff on the evidence found that appellants committed trespass and damages and therefore respondents are entitled to realise the damages from them. The suit was decreed declaring title of respondents to plaint C schedule property and permitting them to put up boundary through GVUTSRO line as marked by the Commissioner in Ext.C2(a) plan. Respondents were also granted decree to realise the damages of Rs.58,000/- from the appellants. Appellants challenged the decree and judgment before Sub Court, Neyyattinkara in A.S.41/2002. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned

Munsiff and dismissed the appeal. It is challenged in the second appeal.

4. Learned counsel appearing for appellants and learned counsel appearing for respondents, who appeared after filing a caveat, were heard. Learned counsel appearing for appellants did not challenge the concurrent decree granted by courts below declaring the title of respondents to the plaint C schedule property or permitting respondents to put up the boundary through GVUTSRO line marked by Commissioner in Ext.C2(a) plan. The argument of learned counsel appearing for appellants is that finding of the courts below that respondents are entitled to realise a damages of Rs.58,000/- is unsustainable, as there is no evidence to prove the same. Learned counsel argued that trial court did not enter a finding on the basis of evidence that it was the appellants who demolished the compound wall or cut the trees and as the case of the appellants is that the way was widened by the public including the persons whose

names were shown in the written statement, without a specific finding that it was the appellants who demolished the compound wall, cut the trees and committed damages the decree directing appellants to pay the damages is unsustainable. Learned counsel also argued that first appellate court also did not enter a specific finding that it was the appellants who committed the damages and therefore the decree for damages is unsustainable.

5. Learned counsel appearing for respondents argued that though it was contended in the written statement that the road was widened by the public, no acceptable evidence was adduced and courts below did not accept that case. It was pointed out that as against that case pleaded what was sought to be proved by the evidence of Dws.1 and 3 was that the compound wall was demolished and the treees were cut not by the public but by the respondents themselves and this was not accepted by the courts below and it is on that evidence, courts below found that appellants committed the damages and

they are liable to pay the damages. Learned counsel also argued that the quantum of damages was not challenged before first appellate court and the judgment of the trial court itself establish that the quantum of damages was not disputed and in such circumstance, no substantial question of law is involved in the appeal.

6. On going through the judgment of the trial court, it is seen that there is no specific finding that on the basis of evidence of PW1 that it was the appellants who committed the damages. But a reading of the judgment shows that trial court discussed the evidence of the witnesses and the contentions of the parties. The trial court found that though in the written statement it was contended that the public widened the road, what was sought to be proved by appellants was that damages was caused not by the public but by the respondents. The argument of learned counsel appearing for appellants is that case of the appellants was not accepted by the trial court for

the reason that it was not pleaded and not that it is not acceptable. It cannot be believed that appellants themselves would demolish their compound wall or cut the trees or destroy the structures for claiming damages. Therefore even if there is a plea on that aspect, evidence of DW1 and DW3 on that fact cannot be believed at all.

7. Eventhough in the written statement, it was contended that the public had widened the road, at the time of evidence only two cases were projected. One was by the respondents that appellants along with their workers caused the damages. The other was by the appellants that it was committed by the respondents themselves. There was no third case namely the damages was caused by third parties. In such circumstance, on the evidence trial court disbelieved the case of appellants and accepted the case of respondents that damages was caused by appellants. It is on that basis trial court granted a decree for realisation of damages from appellants. First appellate court

also considered the evidence. As pointed out by learned counsel appearing for respondents it entered a specific finding that evidence establish that appellants caused the mischief. Eventhough learned counsel appearing for appellants argued that there was no independent appreciation of evidence by first appellate court, in the nature and circumstance of the case, the findings are correct. I do not find any substantial question of law involved in the appeal.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006